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February 10, 2014

Ms. Elizabeth M. Murphy  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

**Re: Rulemaking for "Regulation A-Plus" under Title IV of the JOBS Act of 2012, Proposed Rule Amendments for Small and Additional Issues Exemption under Section 3(b) of the Securities Act (Rel. No. 33-9497; 34-71120; 39-2493; File No. S7-II-13)**

Dear Ms. Murphy:

As a former President of the North American Securities Administrators Association (NASAA), with significant experience in the oversight and enforcement of state and federal securities laws, I am writing to express my surprise and dismay regarding the Commission's decision to propose preempting the authority of states to register and review Regulation A-Plus offerings as part of rules proposed on December 18th to implement Title IV of the JOBS Act.

I support and share the Commission's desire to craft rules that will maximize the potential for Regulation A-Plus to be an effective tool for capital formation. Indeed, I consider Regulation A-Plus a priority, not only for businesses in Nebraska, but also for investors, since successfully implementing the new exemption could help attenuate the significant and negative externalities associated with the repeal of prohibitions on general solicitation in Rule 506 offerings under Title II of the JOBS Act. However, while I believe I share the Commission's ultimate aim, I believe the Commission is severely misguided in its apparent judgment that the best path to implementing Regulation A-Plus is to preempt the states.

It would be irresponsible for me to shirk my responsibilities at home by ceding state authority, knowing how many Nebraska investors have already been harmed by other federal measures that block state review. States such as Nebraska have been the ones to deal with the fallout of the regulatory failure in the Regulation D context.

Having served as President of NASAA during the time Congress considered and passed the JOBS Act, from 2011 to 2012, and having consulted and corresponded during this period with many of the legislation's architects and proponents, including members of Congress, the business community, and the regulatory community, I am quite familiar with the questions Congress wrestled with in attempting to strike an appropriate balance between numerous considerations and priorities, including the preemption of state authority. I participated in this debate, and I was privileged to testify before the Senate Banking

Committee on the bill.<sup>1</sup> Thus, even while I personally disagree with many of the judgments Congress ultimately reached in enacting the law, there is no question in my mind that these judgments were the result of an inclusive, thorough, and deliberative process.

Congress plainly did not intend for states to be preempted from registering or reviewing Regulation A-Plus offerings when it enacted Title IV of the JOBS Act.<sup>2</sup> To the contrary; Congress intended the SEC and the states to be *partners* in the effort.

***Frankly, I am stunned that the Commission would substitute its own judgment for that of Congress on a question as fundamental as the role of the states in effectuating Title IV of the Act.*** Indeed, the Commission's decision in December to propose preempting states under Title IV of the Act by deeming *every* investor and *every* offeree in Regulation A-Plus offerings as "qualified purchasers"<sup>3</sup> appears so far removed from both the intentions of Congress and the realities of this new marketplace that it is almost breathtaking!

In addition, the preemption of state authority is simply unnecessary. The states understand the need for a modern, efficient, coordinated review process that minimizes the regulatory burden to small business issuers. This is exactly why we are engaged in the process of adopting such a new, innovative multi-state review protocol.<sup>4</sup> Our efforts in this regard are no secret, so it is disingenuous for the Commission to justify its decision to preempt the states based on criticisms of an "old" Regulation A review process, while barely acknowledging that those criticisms have been addressed by our new protocol.

Throughout my career as a state securities regulator, and my tenure as NASAA President and as a member of the NASAA Board, the states and the SEC have both benefited from a strong relationship based on a shared mission and an appreciation of the vital role both parties play in protecting investors and maintaining the most robust capital markets in the world. This rule proposal reflects an utter lack of understanding by the SEC's current leadership of the states' important role, and such ignorance will have

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<sup>1</sup> Written Testimony of Jack E. Herstein, President of the North American Securities Administrators Association, Inc. and Assistant Director of the Nebraska Department of Banking & Finance, Bureau of Securities, before the Senate Committee on Banking, Housing, and Urban Affairs at a hearing entitled "Spurring Job Growth Through Capital Formation While Protecting Investors." December 1, 2011

<sup>2</sup> Congress carefully and extensively considered whether or not the new exemption established under Title IV of the JOBS Act ("Regulation A+") should preempt state authority. After weighing the perceived merits of preempting state law and the risk to investors that could arise from such action, Congress affirmatively judged that states should not be preempted from review of offerings under the exemption, citing both the "high-risk" nature of these offerings and the "essential" function that state review plays in discouraging fraud. See *House Committee Report 112-206*, and, *Congressional Record Volume 157, Number 166 (Wednesday, November 2, 2011)*, pp. H7229-H7232.

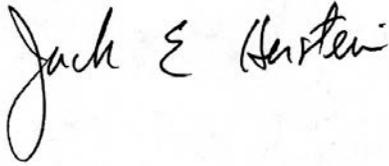
<sup>3</sup> The Commission's use of the qualified purchaser definition under Section 18 is directly contrary to Congressional intent, which was that qualified purchasers must be investors who can protect themselves in the financial markets. A House Report discussing 18(b)(3) discussed the Congressional intent behind qualified purchasers. Specifically, the Report notes: "...The Committee intends that the Commission's definition be rooted in the belief that "qualified" purchasers are sophisticated investors, capable of protecting themselves in a manner that renders regulation by State authorities unnecessary." *H.Rep. No. 104-622, 31-32 (1996)*

<sup>4</sup> For a detailed overview of the multi-state review protocols, see Testimony of Rick Fleming Deputy General Counsel North American Securities Administrators Association, Inc. Before the Senate Committee on Banking, Housing and Urban Affairs; Subcommittee on Securities, Insurance, and Investment, at a hearing entitled "The JOBS Act at a Year and a Half: Assessing Progress and Unmet Opportunities." October 30, 2013

dramatic negative implications for retail investors whose protection will be left in the hands of a federal government that has shown an historic lack of interest in their concerns.

In proposing rules that would effectuate such preemption, the Commission has it wrong. I sincerely hope it will reconsider.

Sincerely,

A handwritten signature in black ink that reads "Jack E. Herstein". The signature is written in a cursive style with a large, looping initial "J".

Jack E. Herstein  
Assistant Director for Securities and Past NASAA President